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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of Judgment : 13th September, 2019

+ W.P.(C) 9892/2019

ANIL KUMAR GUPTA

..... Petitioner

Through

Mr. Sahil Tagotra, Mr. Jitender Mehta
and Mr. Lalit, Advocates

versus

UNION OF INDIA AND ANR

..... Respondents

Through

Mr. Jagjit Singh, Senior Standing
Counsel with Mr. Preet Singh and Mr.
Vipin Chaudhary, Advocates for
respondent no.1.

CORAM:

HON'BLE MR. JUSTICE G.S.SISTANI

HON'BLE MR. JUSTICE ANUP JAIRAM BHAMBHANI

G.S. SISTANI, J. (ORAL)

CMs. APPL 40892-40893/2019 (Exemption)

1. Exemptions allowed, subject to all just exceptions.
2. The applications stand disposed of.

W.P.(C) 9892/2019

3. Notice to show cause as to why the petition be not admitted. Mr. Jagjit Singh, learned Senior Standing Counsel for the respondent No.1 accepts notice.

4. We do not think it necessary to serve notice upon the respondent No.2, who is the successful tenderer and has been awarded the tender prior to the filing of the writ petition.
5. With the consent of the parties, we set down the writ petition for final hearing and disposal.
6. The present writ petition arises out of a tender published by respondent No.1 on 10.12.2018 for allotment of 12 Catering Stalls (Special Minor Units-SMU) at New Delhi, Delhi Jn. and Anand Vihar Terminal Railway Stations in the Delhi Division of Northern Railways for a period of five years. The date for submission of the tender was 15.01.2019 upto 15:00 Hrs. The tender was to be opened immediately.
7. The petitioner submitted its bid on 12.01.2019 for award of the aforesaid tender and admittedly the petitioner was the highest bidder in the tender. However, the grievance of the petitioner is that the respondent No.2 was awarded the tender on 09.08.2019. The petitioner claims that he is an experienced bidder and he has been running different stalls in different places which were duly awarded by the Indian Railways. It is also the complaint of the petitioner that the award of the tender in favour of respondent No.2 is illegal and arbitrary, and moreover, the Railways has failed to furnish any reasons for depriving the petitioner of the tender despite him being the highest bidder.
8. On an advance copy Mr. Jagjit Singh, learned counsel has entered appearance for respondent No.1. He has also produced the original record. Mr. Singh, submits that since the petitioner did not comply with the tender condition no.3.2.1 and 3.5, accordingly the tender was not awarded to him. Reliance is also placed on Annexure 2 Clause 3.5.1,

and more particularly to Clause 9 in the said annexure/certificate. Learned counsel submits that the FSSAI certificate produced by the petitioner had expired and another certificate produced by him was in the name of one Sushil Tripathi, and therefore the requirement of an FSSAI certificate was not fulfilled by the petitioner.

9. In response to the submission made, learned counsel for the petitioner submits that on examination of the FSSAI certificate, it will be seen that the FSSAI certificate is in the name of the petitioner, and the name of Sushil Tripathi has only been mentioned as a nominee; and thus, this ground is not available to the respondent to reject the petitioner's bid.
10. We have heard the learned counsels for the parties and considered their rival submissions.
11. Before taking a view on the rival submissions of the parties, we deem it appropriate to reproduce Clause 3.2, 3.2.1, 3.5, 3.5.1 and also the relevant portion at S.No.9 of Annexure 2, which forms part of Clause 3.5.1, which read as under:

“3.2 Experience of Catering Business(essential)

3.2.1 Minimum three years of experience in catering business. It has to be supported by certificate/letter of experience/allotment from concerned agencies for the last three years duly certified by Chartered Accountant.

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3.5 Additional Mandatory Requirements

3.5.1 All additional mandatory requirements have been enlisted at Annexure-2, Chapter 1 of Section B of the Bid document. This includes Permanent Account Number, GSTIN Registration, FSSAI etc.”

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9.	Experience in Catering Business: Minimum three years of experience in Catering business (It has to be supported by certificate/letter of experience/allotment from concerned agencies for the last three years.)
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12. We also deem it appropriate to take note of the Note at no.2, which forms part of the Annexure, which reads as under:

“Note:

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2. Bids with alterations/cutting/non-compliance of formats or Incomplete in any respect shall be liable to be rejected.”

13. Learned counsel for the petitioner has primarily raised two submissions. Firstly, that the FSSAI certificate is in order and merely because the name of the nominee is mentioned first, that cannot be a ground to reject his bid. Secondly, he submits that the petitioner has submitted the certificate duly attested by a Chartered Accountant as far as the turnover is concerned. Since the experience certificate has been issued by the Railways itself, there is no reason to doubt the authenticity of the certificate; also the said certificate could have been easily verified by the respondent; and furthermore a certificate issued by the Railways could not have been attested by the Chartered Accountant.
14. Mr. Jagjit Singh, learned counsel for the respondent has however contended that the terms of the tender have to be fulfilled. The terms of the tender were neither challenged prior to the participation nor in the present writ petition. It is contended that since the tender condition was not fulfilled in its terms, the respondent was within its right to reject the

bid of the petitioner. He contends that moreover, the tender has been awarded to respondent No.2 on 09.08.2019.

15. It is not in dispute that the tender condition No.3.2.1 has not, in terms, been complied with by the petitioner. As far as FSSAI certificate is concerned, we are of the view that the respondent has overlooked the fact that Sushil Tripathi was mentioned as the nominee of the petitioner and in fact the certificate stands issued in the name of the petitioner. However, as far as condition No.3.2.1 and 3.5 of the tender are concerned, since the petitioner has not complied with the same, we do not find fault with the view taken by the tender committee, which view we have tested on the basis of the original record produced by the respondent. Moreover the tender has already been awarded to respondent No.2 on 09.08.2019.
16. The law is well-settled that while dealing with matters arising from a tender, the Court is only to consider any infirmity in the decision-making process and not the decision itself. Since a specific condition of the tender required that the experience certificate should be attested by a Chartered Accountant, we do not find fault with the respondent having rejected the bid in the absence of such certificate.
17. In the case of ***Suja Sunil Vs. Ministry of Railways & ors., W.P. (C) 12303/2018*** decided on 22.05.2019, this Court in paras 7 and 9 has held as under:

“7. It is not in dispute that the minimum three years’ experience certificate in the catering business was submitted by the petitioner, but it was not duly certified by the Chartered Accountant. It is the stand of learned counsel for the petitioner that it does not stand to reason as to why the Experience Certificate was required to be certified by the

Chartered Accountant when the Experience was with the Railways. We find no force in this submission, as the terms of the Tender are not to be finalized or read into by the Court and it is to be left to the wisdom of the Authority, who has drafted the tender conditions. Admittedly, the three years' Experience Certificate, which, in our view, is an extremely requirement for a catering tender, was not in accordance with the tender conditions. We also find that although the audited balance-sheet may not have been prepared for the year 2017-2018, but the petitioner could have provided the Profit and Loss Accounts or the Income Tax Returns, to comply with the tender condition No.3.3.2. We also find that Condition No.3.5.1 refers to FSSAI Certificate. A reading of Condition No.3.5.1 would make it clear that even if it did not form part of Annexure-II, the language suggests that Permanent Accountant Number, GSTIN Registration and FSSAI Certificate were to be furnished. In this case, FSSAI Certificate was also not furnished by the petitioner.

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9. Law with regard to dealing with the matters pertaining to Tenders is clear in the case of ***Tata Cellular v. Union of India***, (1[994 (6) SCC 651). In para 74 of this judgment, the Apex Court has highlighted that the Court may interfere only in the decision making process and not the decision, which is finally rendered. The same is reproduced as under: -

“74. Judicial review is concerned with reviewing not the merits of the decision in support of which the application for judicial review is made, but the decision making process itself. 77. The duty of the court is to confine itself to the question of legality. Its concern should be: (i) Whether a decision making authority exceeded its powers? (ii) Committed an error of law, (iii) Committed a breach of rules of natural justice, (iv) reached a decision which no reasonable tribunal would have reached or, (v) Abused its powers. Therefore, it is not for the court to determine whether a particular policy or particular

decision taken in the fulfilment of that policy is fair. It is only concerned with the manner in which those decisions have been taken. The extent of the duty to act fairly will vary from case to case. Shortly put, the grounds upon which an administrative action is subject to control by judicial review can be classified as under: (i) Illegality: This means the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. (ii) Irrationally, namely Wednesbury unreasonableness. (iii) Procedural impropriety. The above are only the broad grounds but it does not rule out addition of further grounds in course of time. As a matter of fact in R.V. Secretary of State for the Home Department, ex Brind Lord Diplock (1991) 1 AC 694, Lord Diplock refers specifically to one development namely, the possible recognition of the principle of proportionality. In all these cases the test to be adopted is that the court should “consider whether something has gone wrong of a nature and degree which requires its intervention.”

18. Applying the law to the facts of the present case, we do not find any infirmity in the view taken by the respondent. The writ petition is accordingly dismissed.

CM.APPL 40891/2019(stay)

19. The application stands dismissed in view of the order passed in the writ petition.

G.S. SISTANI, J

ANUP JAIRAM BHAMBHANI, J

SEPTEMBER 13, 2019/pst//